No. 01-7574

Supreme Court, U.S.
FILED
JUN 3 2002

In The
# Supreme Court of the United States

DAVID ALLEN SATTAZAHN,

*Petitioner,*

v.

COMMONWEALTH OF PENNSYLVANIA,

*Respondent.*

**On Writ Of Certiorari To The Supreme Court Of Pennsylvania**

## PETITIONER'S BRIEF

ROBERT BRETT DUNHAM
*Counsel of Record*
ANNE L. SAUNDERS
DEFENDER ASSOCIATION OF PHILADELPHIA
Federal Court Division
Suite 545 West, The Curtis Center
Independence Square West
Philadelphia, PA 19106
(215) 928-0520

JOHN T. ADAMS
LINTON, DISTASIO, ADAMS & PALANGE, P.C.
1720 Mineral Springs Road
P.O. Box 461
Reading, PA 19603-0461
(610) 374-7320

*Counsel for Petitioner, David Allen Sattazahn*

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SUPREME COURT, U.S.

Dated: June 3, 2002

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48 pp

## CAPITAL CASE

## QUESTIONS PRESENTED

1. Does the Double Jeopardy Clause of the Fifth Amendment bar imposition of the death penalty upon reconviction after an initial conviction, set aside on appeal, in which the trial court imposed a statutorily mandated life sentence when the capital sentencing jury failed to reach a unanimous verdict?

2. Whether a capital defendant's life and liberty interest in the mandatory imposition of a life sentence required by state law where the sentencing jury fails to reach a unanimous verdict was violated when the state sought death sentence on retrial?

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## CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is reported as *Commonwealth v. Sattazahn*, 563 Pa. 533, 763 A.2d 359 (2000), and is reprinted in the Joint Appendix (hereinafter "J.A.") at 91-109.

## JURISDICTION

The decision of the Pennsylvania Supreme Court was rendered on November 27, 2000. Petitioner timely filed an application for reargument, which was denied on July 20, 2001. *Commonwealth v. Sattazahn*, 2001 WL 826060 (Pa. July 20, 2001). On October 1, 2001, Justice Souter granted Petitioner an extension until December 17, 2001 to file his petition for a writ of certiorari, which was filed on that date and granted on March 18, 2002. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, which provides in relevant part:

> nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . .

2. It also involves Section 1 of the Fourteenth Amendment to the United States Constitution, which provides in relevant part:

> nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

3. It also involves a constitutional life and liberty interest arising out of 42 PA. C.S. §§ 9711(c)(1)(iv) & (v), which provide in pertinent part:

> (iv) the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.
>
> (v) the court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment.

## STATEMENT OF THE CASE

Petitioner, David Allen Sattazahn, was convicted of murder, robbery, and related offenses following a jury trial in the Berks County Court of Common Pleas in May 1991. *Commonwealth v. Sattazahn*, No. 2194/89 (Berks C.P.). At trial, the prosecution presented evidence that Richard Boyer was found shot to death on April 13, 1987, following an apparent robbery of the restaurant Mr. Boyer managed. Record, N.T. 5/2-3/91 at 45-48. The Commonwealth's case relied primarily on the testimony of Petitioner's co-defendant, Jeffrey Hammer. Pursuant to an agreement



with the Commonwealth,[1] Mr. Hammer testified that he and Petitioner had both been involved in planning the robbery and had cased the restaurant in the days before the April 12, 1987 robbery. Their plan, he testified, had been to rob the manager and then handcuff him. Record, N.T. 5/6/91 at 514-15. Prior to the robbery, Mr. Hammer and Petitioner retrieved two handguns, holsters, and ammunition. Record, N.T. 5/6/91 at 494-96. Mr. Hammer testified that he had a .41 caliber gun and Petitioner carried a .22 caliber gun.

Mr. Hammer further testified that he and Petitioner waited for the manager to leave the restaurant and, as Mr. Boyer was walking towards his truck, they approached him and told him to drop the bank bag. Record, N.T. 5/6/91 at 504. Mr. Boyer threw the bag twice then began to run away. Mr. Hammer testified that both he and Petitioner had fired their weapons. He said that Petitioner was the first to shoot, and that after Mr. Hammer fired, he heard two or three more shots. Record, N.T. 5/6/91 at 506-09. Mr. Hammer testified that Petitioner then retrieved the bank bag, they fled the scene and subsequently divided the money. Record, N.T. 5/6/91 at 510-11, 515, 520-21.

The Commonwealth also presented evidence, through the autopsy and police testimony, indicating that the decedent had suffered wounds consistent with a .22 caliber weapon and that cartridges found at the scene had been fired from a Ruger Mark II .22 caliber gun. Record, N.T. 5/3/91 at 239, 338. Although the salesperson in the

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[1] In exchange for his testimony, the Commonwealth agreed that Mr. Hammer would receive a sentence of a term of years rather than face capital prosecution. Record, N.T. 5/3/91 at 580.

gun store could not identify Petitioner as the person who purchased that weapon some two months before the robbery/murder (*see* Record, N.T. 5/3/91 at 381), the Commonwealth also presented a police handwriting expert who concluded that the signature on paperwork generated in the sale of that weapon was consistent with Petitioner's handwriting. Record, N.T. 5/6/91 at 481-85.

Following presentation of the evidence, the jury found Petitioner guilty and the case proceeded to a capital sentencing hearing on May 9, 1991. At the start of the hearing, the trial court provided the jury introductory instructions on the nature of aggravating and mitigating circumstances and the parties' respective burdens of proof. Record, N.T. 5/9/91 at 19-20; J.A. at 10-11. The parties then presented evidence in support of aggravating and mitigating circumstances, and rested their respective cases. Record, N.T. 5/9/91 at 20-30.

After the close of evidence, the court recessed for the day. The next morning, following argument, the trial court fully instructed the jury on its sentencing options and obligations. Record, N.T. 5/10/91, at 55-60; J.A. at 15-20.

The court again instructed the jury that the Commonwealth bore the burden of proving aggravating circumstances beyond a reasonable doubt, while the defense was required to prove mitigating circumstances by a preponderance of the evidence. Record, N.T. 5/10/91, at 55-56; J.A. at 15-16. The Court also instructed the jury that it must return a death sentence if all of the jurors found at least one aggravating circumstance and no mitigating circumstances or if the jury found that aggravating circumstances outweighed mitigating circumstances, but that the jury must return a sentence of life imprisonment in all other circumstances. Record, N.T. 5/10/91, at 55; J.A.



at 15-16 ("If you do not all agree on one or more of the other of these findings then the only verdict you may return is a sentence of life imprisonment."); *id.* at 57; J.A. at 17 ("As I told you earlier, and as the verdict slip indicates, you must agree unanimously on one of the two general findings before you can sentence the defendant to death").

The trial court further instructed the jury that the court was required as a matter of law to impose a sentence of life imprisonment if the jury could not reach a unanimous verdict of either life or death:

> If you are still unable to agree on a verdict after conscientious and thorough deliberations, report that to me. If it seems to me that you are hopelessly deadlocked *it will be my duty to sentence the defendant to life imprisonment.*[2]

Record, N.T. 5/10/91, at 58; J.A. at 18.

Per Rule 358A of Pennsylvania's *Rules of Criminal Procedure* (subsequently renumbered as PA. R. CRIM. P. 807), the court also provided the jury with a verdict slip, which it instructed the jury to read before commencing its deliberations. Record, N.T. 5/10/91, at 58-59, 60; J.A. at 18, 19. Part D of the instructions on that verdict slip stated in bold capital letters (J.A. at 27):

> **D. IF, AFTER SUFFICIENT DELIBERATION, YOU CANNOT UNANIMOUSLY REACH A SENTENCING VERDICT, DO NOT COMPLETE OR SIGN THIS SLIP, BUT RETURN IT TO THE JUDGE. THE JUDGE WILL DETERMINE IF FURTHER DELIBERATIONS ARE**

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[2] All emphasis supplied unless otherwise indicated.

**REQUIRED; IF THEY ARE NOT, THE JUDGE WILL SENTENCE THE DEFENDANT TO LIFE IMPRISONMENT.**

After three-and-one-half hours of deliberation, the jury returned with a note, signed by the jury foreperson, stating: "Your Honor – [¶] We, the jury are hopelessly deadlocked at 9-3 for life imprisonment. Each one is deeply entrenched in their position. We do not expect anyone to change his or her position." Record, N.T. 5/10/91, at 67; Court Exhibit No. 4; J.A. at 25.

The trial court conducted the factual inquiry mandated by Pennsylvania law to ascertain whether the sentencing jury was unable to reach a unanimous verdict. Record, N.T. 5/10/91, at 62-64; J.A. at 21-24. Finding the jurors deadlocked, the trial court discharged the jury and announced that it would impose a life sentence upon Petitioner, as statutorily mandated by 42 PA. C.S. § 9711(c)(1)(v):

> THE COURT: . . . The Court at this time finding that you are unable to find unanimously for either sentence of death or life imprisonment will discharge you from your duties in deliberating any further in this particular case. And because of that, as a result of your inability to unanimously decide, the Court, by virtue of the l..w, will at the time of formal imposition of sentence sentence this defendant to life imprisonment.

Record, N.T. 5/10/91, at 64; J.A. at 23-24.

On February 14, 1992, the court formally imposed that life sentence and remanded Petitioner into the custody of the state prison system to serve that sentence. *See* Record, Sentencing Order, Sentencing Guideline Sentence Form/Commitment Authorization; J.A. at 30, 35, 40.



The Commonwealth could not appeal this adjudication of sentence, nor could Petitioner appeal any issue relating to this legal determination of life over death.

On March 12, 1992, Petitioner appealed his convictions to the Superior Court of Pennsylvania, the Commonwealth's intermediate appellate court. *Commonwealth v. Sattazahn*, No. 01024 PHILA (Pa. Super.). On July 30, 1993, the Superior Court reversed. *Commonwealth v. Sattazahn*, 428 Pa. Super. 413, 631 A.2d 597 (1993), *rearg. denied* Oct. 6, 1993. The Commonwealth filed for allowance of appeal, and Petitioner sought allowance of cross-appeal on other guilt-stage issues. *Commonwealth v. Sattazahn*, No. 0544 M.D. 1993 (Pa.). On April 15, 1994, the Supreme Court of Pennsylvania denied Petitioner's motion and initially granted the Commonwealth allowance of appeal. *Commonwealth v. Sattazahn*, 537 Pa. 639, 644 A.2d 162 (1994). However, on December 30, 1994, the Court dismissed that appeal as having been improvidently granted. *Commonwealth v. Sattazahn*, 539 Pa. 270, 652 A.2d 293 (1994). The case returned to the Berks County Court of Common Pleas for a new trial.

On March 9, 1995, the Commonwealth filed notice of intent to seek the death penalty on retrial. J.A. at 47-53. Four days later, Petitioner moved to prevent the Commonwealth from capitally retrying him. The Court of Common Pleas, per Judge Keller, held that neither the state or federal constitutions nor Pennsylvania law, prevented Petitioner "from choosing between his right to appeal a life sentence mandated by 42 Pa. C.S.A. §9711(c)(2) *and the remote risk of a death sentence upon retrial*." Opinion of the Trial Court, at 1 (July 19, 1995) ("Pretrial Opinion"); J.A. at 54.

Petitioner appealed this order to the Superior Court, No. 02274 PHILA 1995. On April 18, 1996, a split panel of the Superior Court affirmed. Slip op. (Apr. 18, 1996) (with Brosky, J., dissenting), *rearg. denied*, June 21, 1996; J.A. at 73-81. The intermediate appellate court relied upon the Pennsylvania Supreme Court's per curiam decision in *Commonwealth v. Martorano*, 535 Pa. 178, 634 A.2d 1063 (1993), which held that a directed verdict of life imposed by the trial court after the sentencing jury could not reach a unanimous verdict did not constitute an acquittal of death and so did not implicate double jeopardy. The Supreme Court of Pennsylvania denied Mr. Sattazahn's petition for allowance of appeal from the Superior Court's decision. *Commonwealth v. Sattazahn*, 547 Pa. 742, 690 A.2d 1162 (1997) (No. 469 M.D. 1996). Petitioner reasserted and preserved his objections to capital retrial in an *in camera* pretrial proceeding on December 29, 1998. Record, N.T. *In Camera* Pretrial Hearing, 12/29/98, at 3-4; J.A. at 83. The trial court again rejected Petitioner's objections to a capital retrial. *Id.*

The retrial was conducted between January 12 and January 22, 1999. On January 22, the death-qualified jury found Petitioner guilty of first degree murder and related charges. Later that same day, the court conducted a brief sentencing-stage hearing[3] at which "the remote risk of a death sentence upon retrial" became a reality: Mr. Sattazahn was sentenced to death. *See* Record, Verdict Slip at 2; J.A. at 86. The trial court formally imposed sentence on

[3] The entire defense case at resentencing occupies twelve pages of transcript. Record, N.T. 1/22/99, at 592-603.



February 16, 1999, Record, Sentencing Order; J.A. at 90, and Petitioner filed a notice of appeal on February 25, 1999.

Petitioner challenged his conviction and sentence on a number of grounds, including those asserted herein. On November 27, 2000, the Pennsylvania Supreme Court upheld Petitioner's conviction and death sentence by a bare 4-3 majority. *Commonwealth v. Sattazahn*, 563 Pa. 533, 763 A.2d 359 (2000); J.A. at 91-109.[4] As had the Superior Court in 1996, the Pennsylvania Supreme Court relied upon its 1993 per curiam decision in *Martorano* to reject Petitioner's double jeopardy claim. *Sattazahn*, 563 Pa. at 545-49, 763 A.2d at 366-68; J.A. at 100-05. It wrote:

> Sattazahn argues that *Martorano* was wrongly decided because it is irrelevant whether the life sentence is a result of a unanimous jury verdict or operation of law following jury deadlock because either situation is an acquittal on the merits. This is the exact issue raised by the Appellant in *Martorano* and after a thorough discussion of *North Carolina v. Pearce,* 395 U.S. 711 (1969); *Bullington v. Missouri,* 451 U.S. 430 (1981); *Arizona v. Rumsey,* 467 U.S. 203 (1984) and *Poland v. Arizona,* 476 U.S. 147 (1986) we rejected it.

*Sattazahn*, 563 Pa. at 547, 763 A.2d at 367; J.A. at 102-03.

The state court, tracking its analysis of double jeopardy in *Martorano*, interpreted this Court's double jeopardy

[4] Three Justices dissented on the grounds that the capital retrial unconstitutionally burdened Petitioner's state constitutional right to appeal.

rulings as applying only where there has been a prior factfinding by the ultimate sentencer that resulted in an "implied acquittal" of death. It wrote:

> In *Martorano,* we applied *Bullington* and *Rumsey* and held that the Commonwealth is not precluded from seeking the death penalty on retrial, where, following their first trial, defendants were convicted of first-degree murder and sentenced to life imprisonment, not by a unanimous jury verdict, but by the trial judge following the jury's deadlock regarding the penalty. The hung jury did not act as an acquittal on the merits as did the proceedings at issue in *Bullington* and *Rumsey.*

*Sattazahn*, 563 Pa. at 547, 763 A.2d at 367; J.A. at 102. The state court distinguished *Bullington* on the grounds that the unanimous jury verdict in that case had "impliedly decided that the prosecution had not proved its case for death," whereas the non-unanimous "hung jury" in this case did not itself reach a verdict. *Id.* at 546, 763 A.2d at 366; J.A. at 101. It then distinguished *Rumsey* on the grounds that the trial court in *Rumsey* had imposed a life sentence only after itself making predicate findings of fact that the prosecution had failed to prove its case for death, whereas here "the imposition of a life sentence by the trial judge [did not] operate as an acquittal." *Id.* at 548, 763 A.2d at 367; J.A. at 103 (quoting *Martorano*).

The state court anchored its no-acquittal reasoning on the fact that "[u]nder Pennsylvania's sentencing scheme, the judge has no discretion to fashion sentence once he finds that the jury is deadlocked. The statute directs him to enter a life sentence." *Id.* (citing 42 PA. C.S. § 9711(c)(1)(v)). Therefore, the court opined, "the judge



makes no findings and resolves no factual matter. Since judgment is not based on findings which resolve some factual matter, it is not sufficient to establish legal entitlement to a life sentence. A default judgment does not trigger a double jeopardy bar to the death penalty upon retrial." *Id.*

The Pennsylvania Supreme Court also relied upon *Martorano* to summarily reject Petitioner's due process claim. *Id.* at 549, 763 A.2d at 368; J.A. at 105-07. Although the state court stated that the due process claim had been raised as a state law issue, it opined that "Pennsylvania's constitutional analysis of these issues is the same as the federal approach." *Id.*; J.A. at 105.

Petitioner timely sought reargument based upon the state court's failure to take into consideration this Court's post-*Martorano* double jeopardy decisions, and because the state court had failed to address his due process claim. With two Justices dissenting, the Pennsylvania Supreme Court denied Petitioner's application for reargument on July 20, 2001. *Commonwealth v. Sattazahn*, 2001 WL 826060 (Pa. July 20, 2001) (per curiam). On December 17, 2001, Petitioner timely filed a Petition for writ of certiorari, seeking review of his case. This Court granted certiorari.

## SUMMARY OF ARGUMENT

David Sattazahn received a life sentence after a capital trial and sentencing proceeding, tried to completion in 1991. After reversal of his original conviction, Pennsylvania once again sought, and this time obtained, a death sentence in his second capital trial. This death sentence

violated the Double Jeopardy Clause of the Fifth Amendment. *Bullington v. Missouri*, 451 U.S. 430 (1981).

Pennsylvania law places upon the prosecution the burden of persuading all twelve capital sentencing jurors that death is the appropriate punishment. If the jury unanimously agrees on a sentence – whether it is life or death – the court must impose the jury's verdict. Whenever the jury is unable to reach a unanimous verdict, the prosecution has failed to meet its burden of persuasion. When that occurs, as it did in Petitioner's initial capital trial, Pennsylvania law mandates that the trial court discharge the jury and impose a sentence of life imprisonment as a matter of law.

Because this type of jury deadlock actually results in the imposition of a sentence, the case fundamentally differs from those in which a jury deadlock on the question of guilt or sentencing produces a "hung jury." In the former, the trial proceedings are finally determined; in the latter, the "hung jury" prematurely terminates the trial proceedings without any final resolution. As a result of this factual and legal distinction, long-established principles of double jeopardy, due process, and fundamental fairness apply to the retrial of a life-sentenced defendant that are inapplicable in the context of a "hung jury" mistrial. When Pennsylvania capitally retried Petitioner and sought and obtained a sentence of death, that death-after-life sentence violated the Fifth and Fourteenth Amendments.

Pennsylvania's capital sentencing hearings are trial-like proceedings on the issue of punishment that are materially indistinguishable from those of the Missouri and Arizona death penalty statutes to which this Court has held jeopardy attaches. *Bullington*; *Arizona v. Rumsey*,



467 U.S. 203 (1984). Consequently, when a Pennsylvania capital defendant receives a life sentence after a capital sentencing proceeding tried to completion, "requiring [him] to submit to a second, identical proceeding [is] tantamount to permitting a second prosecution of an acquitted defendant." *Schiro v. Farley*, 510 U.S. 222, 231 (1994).

Here, the prosecution presented evidence and argument that was insufficient to convince nine of twelve jurors that Petitioner should be sentenced to death. Because of the Commonwealth's failure of proof, the trial court imposed a life sentence as a matter of law. 42 PA. C.S. § 9711(c)(1)(v). Trial court rulings that the prosecution has failed, as a matter of law, to establish a defendant's guilt constitute acquittals for double jeopardy purposes. And regardless of how the final adjudication of Petitioner's first sentencing hearing is characterized, the fact remains that he was sentenced to death after obtaining a life sentence when initially placed in jeopardy. Subjecting him to successive capital prosecutions, including twice facing the hazards of a trial-like capital sentencing hearing tried to completion, violated double jeopardy. This Court should reverse Petitioner's death sentence and declare that a life sentence imposed by operation of law following a capital sentencing hearing that has been tried to completion implicates double jeopardy.

Similarly, when a state mandates certain capital sentencing procedures or establishes the right to particular appellate, post-conviction, or post-sentencing review in capital cases, it creates Fourteenth Amendment life and liberty interests in those procedures. *Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998); *Ford v. Wainwright*, 477

U.S. 399, 427-31 (1986) (O'Connor, J., concurring). Here, Pennsylvania enacted a capital sentencing scheme that provided three possible verdicts: a unanimous verdict of death; a unanimous verdict of life; and a sentence of life by operation of law as a result of the jury's inability to reach a unanimous verdict. The life sentence that is the product of these procedures is final and unappealable by either side.

These procedures are an integral part of Pennsylvania's system for finally adjudicating whether a capital defendant will live or be sentenced to die. This and the unmistakably mandatory character of Pennsylvania's capital sentencing provisions create a substantial and legitimate expectation that a capital defendant who receives a judicially-imposed directed verdict for life resulting from a jury deadlock will not be subject to execution for his offense. Further, Pennsylvania makes no statutory distinction between the treatment of life sentences imposed by judicially directed verdicts and those imposed by unanimous juries in the event the defendant successfully appeals his conviction. Nor did it advise the sentencing jury or Petitioner that a successful appeal could jeopardize its non-unanimous verdict and his life sentence. These factors further strengthen the expectation that Pennsylvania would respect the life sentence that was mandated by its sentencing laws.

Pennsylvania was not constitutionally required to impose a directed life verdict when its capital sentencing juries deadlock, but having chosen this approach, it created a constitutionally protected life and liberty interest in the resulting life sentence. Pennsylvania may not arbitrarily deny Petitioner the life sentence mandated by its laws. This Court should reverse Petitioner's death sentence, and enforce his life and liberty interest in the



directed life verdict that was mandated by Pennsylvania's capital sentencing statute.

## ARGUMENT

### I. The Capital Retrial of David Sattazahn after His First Capital Sentencing Proceeding Resulted in the Imposition of a Life Sentence by Operation of Law Violated His Federal Constitutional Right to Be Free from Double Jeopardy.

David Sattazahn received a life sentence after a capital trial and sentencing proceeding, tried to completion in 1991. After reversal of his original conviction, Pennsylvania once again sought, and this time obtained, a death sentence in his second capital trial.

After Petitioner was convicted of first degree murder in his original trial, the case proceeded – per Pennsylvania law – to a second evidentiary proceeding. That proceeding was governed by title 42, section 9711 of the Pennsylvania Criminal Code. The capital sentencing statute guided the discretion of Petitioner's capital sentencer in deciding between the sentencing options of life without parole or death by providing detailed statutory standards defining aggravating and mitigating circumstances, establishing evidentiary requirements and burdens of proof applicable to these circumstances, and carefully setting forth the circumstances in which each of the alternative sentences may be imposed.

Pennsylvania's capital sentencing statute provides for two – and only two – sentencing options: life without possibility of parole or death. In seeking death, the

Commonwealth is required to prove one or more statutorily enumerated aggravating circumstances beyond a reasonable doubt.[5] When a jury is empaneled as the capital sentencer, it must unanimously agree that the Commonwealth has proven an aggravating circumstance before the jury may weigh that particular circumstance in its sentencing determination. On the other hand, a capital defendant is permitted to present any statutorily enumerated or constitutionally recognized mitigating circumstance[6] and must prove each circumstance by a preponderance of the evidence. The jury is required to weigh all mitigating circumstances found by any one or more of the jurors. 42 PA. C.S. § 9711(c)(1)(iii).

The capital sentencing statute also affords a capital defendant "a 'presumption of life'" in the penalty phase of trial. *Commonwealth v. Travaglia*, 502 Pa. 474, 499, 467 A.2d 288, 300 (1983). In so doing, it places the burden of persuasion on the prosecution such that death may not be imposed unless the capital sentencer has unanimously determined beyond a reasonable doubt that at least one aggravating circumstance exists and, even then, death may not be imposed unless the defendant has failed to prove any mitigating circumstances or if the aggravating circumstance(s) outweigh the mitigating circumstance(s) found. 42 PA. C.S. § 9711(c)(1)(iv)-(v); *Blystone v. Pennsylvania*, 494 U.S. 299, 305 (1990).[7] When the defendant is

[5] The aggravating circumstances are set forth in 42 PA. C.S. § 9711(d).

[6] The statutorily enumerated mitigating circumstances are set forth in 42 PA. C.S. § 9711(e).

[7] *See also Commonwealth v. Baker*, 531 Pa. 541, 569, 614 A. 2d 663, 677 (1992) (Pennsylvania's death penalty "statute . . . decides a 'tie,' and equal balance of aggravation and mitigation, in favor of the defense.").



tried before a sentencing jury, the statute places upon the prosecution the burden of persuading all twelve capital sentencing jurors that death is the appropriate punishment. The prosecution meets its burden of persuasion only when the jury has reached a unanimous verdict of death. In all other circumstances, state law mandates the imposition of a sentence of life without possibility of parole. 42 PA. C.S. § 9711(c)(1)(iv).

Pennsylvania also has adopted formal procedures for imposing sentence following the presentation of evidence and the jury's deliberations. Under Pennsylvania law, the court imposes the jury's verdict whenever the jury unanimously agrees upon a sentence. However, when the trial court determines that the sentencing jury cannot reach a unanimous verdict, Pennsylvania law requires that the trial court impose a sentence of life imprisonment as a matter of law. 42 PA. C.S. § 9711(c)(1)(v).

At the close of a capital sentencing jury trial in Pennsylvania, the jury is instructed in the applicable burdens of proof and persuasion. The instructions explain the combination of factfindings that may result in the imposition of sentence by a unanimous jury. The jury is also specifically instructed that, if it is not able to reach a unanimous verdict, the court will impose a life sentence. 42 PA. C.S. § 9711(c)(1). The jury is also provided a *First Degree Murder Sentencing Verdict Slip*, which it is instructed to read before beginning its deliberations. The verdict slip informs the jury in bold capitalized letters:

> **IF, AFTER SUFFICIENT DELIBERATION, YOU CANNOT UNANIMOUSLY REACH A SENTENCING VERDICT, DO NOT COMPLETE OR SIGN THIS SLIP, BUT RETURN IT TO THE JUDGE. THE JUDGE WILL**

**DETERMINE IF FURTHER DELIBERATIONS ARE REQUIRED; IF THEY ARE NOT, THE JUDGE WILL SENTENCE THE DEFENDANT TO LIFE IMPRISONMENT.**

PA. R. CRIM. P. 358A (subsequently renumbered as PA. R. CRIM. P. 807); *see* J.A. at 27.

In Petitioner's 1991 trial, the Commonwealth introduced evidence of a single aggravating circumstance – murder during the perpetration of a felony (robbery) – and Petitioner presented mitigating evidence of his lack of any significant history of prior criminal convictions and his age at the time of the crime. *Commonwealth v. Sattazahn*, 563 Pa. 533, 539, 763 A.2d 359, 362 (2000); J.A. at 92; *Verdict Slip* at 1; J.A. at 26-27. Following the presentation of evidence and argument by both sides, the trial court instructed the jury as required by Pennsylvania law, including an instruction that the court was legally required to impose a sentence of life imprisonment if the jury could not reach a unanimous verdict of either life or death. Record, N.T. 5/10/91, at 55-60; J.A. at 15-20.

The trial court also provided the jury with a verdict slip containing the language specified by Rule 358A (see above), and instructed the jury on the use of the verdict slip during its deliberations. Record, N.T. 5/10/91, at 58-60; J.A. at 18-19. After the jury reported that it was "hopelessly deadlocked at 9-3 in favor of life imprisonment" with the jurors "deeply entrenched in their position," Record, N.T. 5/10/91, at 67, Court Exh. 4; J.A. at 25, the trial court discharged the jury pursuant to 42 PA. C.S. § 9711(c)(1)(v) and imposed the statutorily mandated directed verdict of life imprisonment. Record, N.T. 5/10/91, at 63-64; J.A. at 23-24.



The trial court subsequently advised Petitioner that he had a right to appeal his conviction, but did not ever inform Petitioner of the possibility that a successful appeal of his homicide conviction could subject him to a second capital prosecution. Petitioner then appealed his homicide and robbery convictions, and the Pennsylvania Superior Court overturned those convictions on July 30, 1993. Several months later, in *Commonwealth v. Martorano*, 535 Pa. 178, 634 A.2d 1063 (1993), the Pennsylvania Supreme Court held for the first time that a directed verdict of life imposed by the trial court after a capital sentencing jury could not reach a unanimous verdict did not constitute an acquittal of death and so did not implicate double jeopardy.

After the Pennsylvania Supreme Court declined to review Petitioner's successful appeal, the prosecution provided notice of its intention to seek death a second time. The state courts – alluding to "the remote risk of a death sentence upon retrial," Pretrial Opinion at 1; J.A. at 54 – rejected Petitioner's pre-trial efforts to quash the capital reprosecution. Given this second opportunity to obtain a death verdict, the case proceeded to a second capital sentencing hearing and this time Petitioner was sentenced to death.

Mr. Sattazahn's death-after-life sentence must be reversed, for Pennsylvania subjected him "to be twice put in jeopardy of life" for the same offence. U.S. CONST. Amend. 5.

A State violates the Double Jeopardy Clause of the Fifth Amendment when it subjects a defendant who received a life sentence in his original capital sentencing trial to a capital retrial and death sentence after reversal of his original conviction. *Bullington v. Missouri*, 451 U.S.

430 (1981) (double jeopardy where jury had sentenced capital defendant to life imprisonment after trial-like capital sentencing proceeding); *Arizona v. Rumsey*, 467 U.S. 203 (1984) (double jeopardy where, after trial-like capital sentencing proceeding, trial judge sentenced capital defendant to life based upon erroneous view that the evidence did not support any aggravating circumstances). As this Court has clearly explained, "the Double Jeopardy Clause applies to . . . *capital sentencing proceeding[s]*" and bars imposition of the death penalty on retrial whenever "an initial conviction, set aside on appeal, *has resulted in rejection of the death sentence*." *Rumsey*, 467 U.S. at 209. Double jeopardy applies because when a capital defendant receives a life sentence after a "capital sentencing proceeding [that] 'was itself a trial on the issue of punishment,' requiring [him] to submit to a second, identical proceeding [is] tantamount to permitting a second prosecution of an acquitted defendant." *Schiro v. Farley*, 510 U.S. 222 (1994) (quoting and citing *Bullington*).[8]

The double jeopardy violation in this case is evident from a comparison between Pennsylvania's capital sentencing proceedings and those of the other states whose capital sentencing proceedings this Court has held implicate the Double Jeopardy Clause. Simply put, Pennsylvania's capital sentencing proceedings are indistinguishable for double

[8] *Cf. Poland v. Arizona*, 476 U.S. 147 (1986) (no double jeopardy where trial judge sentenced capital defendant to death based upon finding of a single aggravating circumstance that was not supported by the evidence when death sentence could have been supported by another aggravating circumstance that the trial court erroneously believed was not present; double jeopardy *would have attached* if court's error had resulted in a life sentence).



jeopardy purposes from those in *Bullington* (Missouri) and *Rumsey* (Arizona).

- As in Arizona and Missouri, the capital sentencer is faced with a choice of only two sentencing options. In Arizona, the capital sentencer was required to choose between death or the sentencing alternative of life without possibility of parole for 25 years; in Missouri, death or the sentencing alternative of life without possibility of release for 50 years; and in Pennsylvania, death or the sentencing alternative of life without the possibility of parole.

- In all three states, the sentencer must make this decision guided by detailed statutory standards defining aggravating and mitigating circumstances, based upon evidence introduced in a separate proceeding that has all the formal elements of a trial.

- All three sentencing statutes require proof of aggravating circumstances beyond a reasonable doubt, pursuant to procedures governing the admissibility of evidence.

- All three statutes identify those circumstances in which a death sentence may be imposed and in which a life sentence may be imposed.

*Rumsey*, 467 U.S. at 209-10; *Bullington*, 451 U.S. at 432-35; 42 PA. C.S. § 9711; 42 PA. C.S. § 9756(c); 61 PA. C.S. § 331.21.[9] As in Missouri, any jury decision to impose the

[9] "That the sentencer in [Pennsylvania when a jury deadlocks] is the trial judge rather than the jury does not render the sentencing

(Continued on following page)

death penalty must be unanimous; and if the jury cannot agree on a sentence, the defendant is sentenced to life imprisonment by operation of law. *Bullington*, 451 U.S. at 434-35; 42 PA. C.S. § 9711(c)(1)(iv)-(v).

"For these reasons, when the Missouri" or Arizona or Pennsylvania "sentencer imposes a sentence of life imprisonment in a capital sentencing proceeding, it has determined that the prosecution has failed to prove its case." *Rumsey*, 467 U.S. at 209. Because "the anxiety and ordeal suffered by a defendant in Missouri's" and Arizona's and Pennsylvania's "capital sentencing proceeding are the equal of those suffered in a trial on the issue of guilt, . . . the Double Jeopardy Clause prohibits the State from resentencing the defendant to death after the sentencer has in effect acquitted the defendant of that penalty." *Id.*

In short, as this Court explained:

> [A] sentence imposed after a completed Arizona [or Pennsylvania] capital sentencing hearing is a judgment like the sentence at issue in Bullington v. Missouri, which this Court held triggers the protections of the Double Jeopardy Clause.
>
> The double jeopardy principle relevant to respondent's case is the same as that invoked in Bullington: an acquittal on the merits by the sole decisionmaker in the proceeding is final and bars retrial on the same charge. Application of the Bullington principle renders respondent's death sentence a violation of the Double Jeopardy Clause because respondent's initial sentence of

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proceeding any less like a trial," nor does the fact that "no appeal need be taken if life imprisonment is imposed." *Rumsey*, 467 U.S. at 210.



> life imprisonment was undoubtedly an acquittal on the merits of the central issue in the proceeding – whether death was the appropriate punishment for respondent's offense. . . . [A]s required by state law, the court then entered judgment in respondent's favor on the issue of death. That judgment, based on findings sufficient to establish legal entitlement to the life sentence, amounts to an acquittal on the merits and, as such, bars any retrial of the appropriateness of the death penalty.

*Rumsey*, 467 U.S. at 210-11; *see Green v. United States*, 355 U.S. 184, 190-91 (1957) (conviction of defendant for second degree murder was an implied acquittal of accompanying charges of first degree murder, and double jeopardy barred retrial for first degree murder when conviction was reversed on appeal).

In *Sattazahn* and *Martorano*, however, the Pennsylvania Supreme Court held that the Fifth Amendment's double jeopardy protections attach whenever a final, unappealable judgment of life is imposed by operation of the state-law mechanism of a unanimous jury verdict but not when a final, unappealable judgment of life is imposed by operation of the state-law mechanism of a directed verdict of life by the trial judge following a jury deadlock on sentencing. *Sattazahn*, 563 Pa. at 547-49, 763 A.2d at 367-68; J.A. at 102-04; *Martorano*, 535 Pa. at 188, 634 A.2d at 1067-68. This cramped interpretation of the Fifth Amendment elevates form over substance and badly misapprehends this Court's decisions on double jeopardy. This Court's precedents establish that double jeopardy attaches whenever a capital defendant is subjected to trial-like capital sentencing proceedings, tried to completion, and the sentencing proceedings terminate with the

imposition of a sentence other than death. *Bullington*, *Rumsey*, *supra*.

Here, David Sattazahn's legal entitlement to the life sentence he received in his first capital sentencing proceeding is beyond question. The State presented evidence that persuaded only three jurors that death was the appropriate penalty. The evidence and argument it presented was not, however, weighty or convincing enough to persuade the other nine jurors to impose death. As a result of the prosecution's failure to meet its burden of persuasion, the trial court sentenced Petitioner to life imprisonment.

Pennsylvania's erroneous death-after-life double jeopardy jurisprudence entirely ignores the trial-like nature of the Commonwealth's capital sentencing proceeding and the constitutional consequences produced by the termination of capital jeopardy that results when such a proceeding is tried to completion. Instead, Pennsylvania colloquially misdescribes a deadlocked capital sentencing jury as a "hung jury," and then misascribes the very different double jeopardy consequences of a hung jury to the termination of jeopardy produced by a non-unanimous capital sentencing jury under Pennsylvania law. But in fact and law under Pennsylvania's capital sentencing scheme, a non-unanimous capital sentencing jury is not a "hung jury" that prematurely terminates the trial proceedings without any final resolution of the case. The jury is discharged, but this does not produce a mistrial. On the contrary, the legislature specifically envisioned that a capital sentencing trial might produce a divided jury that could not agree on the appropriate sentence. It dealt with that possibility by requiring the court to impose a life sentence as a matter of law.



This distinction makes a difference. The typical hung jury produces no legal judgment. Instead, it produces a mistrial that does not determine the outcome of the trial. This is not an acquittal and does not terminate the case. *United States v. Perez*, 9 U.S. (Wheat) 579, 580 (1824). On the other hand, when a trial court enters a directed verdict for the defendant after discharging a deadlocked jury, that directed verdict constitutes a judgment of acquittal that "act[s] to terminate a trial in which jeopardy has long since attached." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 570 (1977). Once acquitted, whether by a jury or the court, "subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause." *Smalis v. Pennsylvania*, 476 U.S. 140, 145 (1986) (citing *Arizona v. Rumsey*, 467 U.S. 203, 211-12 (1984)).

Pennsylvania law mandates that, if the jury cannot reach a unanimous verdict after consideration of the evidence on the issue of whether the defendant should live or die, "the court shall sentence the defendant to life imprisonment." 42 PA. C.S. § 9711(c)(1)(v). It necessarily follows that:

> such a judgment of acquittal plainly concludes a pending prosecution in which jeopardy has attached, following the introduction at trial of evidence on the general issue. In that circumstance we hold that "although retrial is sometimes permissible after a mistrial is declared but no verdict or judgment has been entered, the verdict of acquittal foreclosed retrial and thus barred appellate review."

*Martin Linen*, 430 U.S. at 576 (quoting *United States v. Wilson*, 420 U.S. 332, 348 (1975)).

The discharge of a non-unanimous capital-sentencing jury in Pennsylvania does not produce a mistrial without final judgment. Quite the opposite. It produces an unappealable directed verdict of life imprisonment that terminates the capital sentencing trial. This judicially imposed life sentence is an acquittal of death that triggers double jeopardy protections.[10]

The Pennsylvania Supreme Court's holding that the issuance of a statutorily mandated "default judgment" for life following discharge of a non-unanimous jury "is not sufficient to establish legal entitlement to a life sentence" for double jeopardy purposes because the judge who imposed the life sentence has "ma[de] no findings and resolve[d] no factual matter," *Sattazahn*, 563 Pa. at 548, 763 A.2d at 367; J.A. at 103; *Martorano*, 535 Pa. at 194, 634 A.2d at 1070, is similarly unfounded. A defendant need

[10] The Pennsylvania Supreme Court's interpretation of the federal double jeopardy doctrine in this case is reminiscent of its interpretation of federal double jeopardy doctrine in *Smalis v. Pennsylvania*, 476 U.S. 140 (1986), and is erroneous for the same reasons. Here, as in *Smalis*, the court ruled that a trial court's entry of judgment for the defendant *as a matter of law* (a directed verdict in this case; in *Smalis*, a demurrer) "is not a factual determination" and therefore "is not the functional equivalent of an acquittal." *Smalis*, 476 U.S. at 143. This Court explained that a demurrer – which enters judgment for the defendant as a matter of law when the evidence was insufficient to permit a conviction – "is an acquittal under the Double Jeopardy Clause." *Id.* at 144. Similarly, here, a directed life verdict – which enters judgment for the defendant as a matter of law when the prosecution's evidence was insufficient to permit a death sentence because the prosecution has not met its burden of persuading all twelve jurors that death is the appropriate punishment – also is an acquittal under the Double Jeopardy Clause. Indeed, *Smalis* makes clear that even an erroneous ruling of law that results in the imposition of a life sentence in a capital sentencing proceeding amounts to an acquittal of death for double jeopardy purposes. *Id.* at 145 n.8.



not establish his factual innocence of death to demonstrate his "legal entitlement to a life sentence" any more than he must establish factual innocence of an offense to be legally entitled to a guilt-stage acquittal. Where the state has the burden of persuasion on the issue of death, a defendant need only show that the state has failed to carry its burden by failing to persuade.

As described above, a jury's failure to unanimously agree that death should be imposed amounts to a decision, by operation of Pennsylvania law, that death is *not* the appropriate punishment. Pennsylvania law explicitly states that a death sentence is permissible only when (1) the sentencing jury unanimously agrees both that the state has proven one or more aggravating circumstances and that the defendant has proven no mitigating circumstances; or (2) the sentencing jury unanimously agrees that the aggravating circumstance(s) that all jurors have found to exist outweigh the combination of mitigating circumstances that any of the jurors have found to exist. When this does not occur, either because the weighing process has produced a unanimous life verdict or because the jurors cannot reach unanimity, the defendant is legally entitled to a life sentence.

Likewise, the trial court is not required to make any specific factfindings as to the existence of aggravating and mitigating circumstances or their relative weight before imposing a life sentence. The only facts that the court must find to establish a defendant's legal entitlement to a life sentence are that the sentencing jury is not unanimous and that the non-unanimous jury is deadlocked. *Sattazahn*, 563 Pa. at 548, 763 A.2d at 367; J.A. at 103 ("Under Pennsylvania's sentencing scheme, the judge has no discretion to fashion sentence once he finds that the jury is

deadlocked. The statute directs him to enter a life sentence."). The consequences of that deadlock – that the Commonwealth has failed to muster evidence sufficient to convince the jury to impose death – mandates "enter[ing] an 'acquittal,' i.e., a life sentence." *Smalis*, 476 U.S. at 145 n.8. At that point, "the Double Jeopardy Clause bar[s] a second sentencing hearing." *Id.*

As set forth above, the decisions of Pennsylvania's supreme court assert that double jeopardy attached in *Bullington* only because the acquittal of death by the sentencing jury in that case was unanimous. They assert that double jeopardy attached in *Rumsey* because of the nature of the trial court's factfinding, rather than the nature of the trial court's judgment.[11] But this Court has

[11] The Pennsylvania Supreme Court misreads *Rumsey* as requiring a specific factfinding of aggravating and mitigating circumstances that could legally support no sentence other than life before the resulting judgment could amount to an acquittal on the merits. But *Rumsey* said no such thing. It said, "as required by state law, the court then *entered judgment in respondent's favor* on the issue of death. That judgment . . . amounts to an acquittal on the merits and, as such, bars any retrial of the appropriateness of the death penalty." *Rumsey*, 467 U.S. at 211. The Court, per Justice O'Connor, indicated in a subordinate clause that the judgment in that particular case had been "based on findings sufficient to establish legal entitlement to the life sentence," *id.*, but did not say – as Pennsylvania erroneously contends – that the judgment could not amount to an acquittal on the merits *unless* it was based on findings sufficient to establish legal entitlement to the life sentence. This Court has consistently held that *any* judgment in the defendant's favor – even one that is based on erroneous factfinding that (but for the error) would be insufficient to establish legal entitlement to a life sentence or guilt-stage acquittal – implicates double jeopardy and bars retrial. In this case, the trial judge, "as required by state law," entered a directed verdict of life that constituted a "judgment in respondent's favor on the issue of death." That judgment – even though produced by a jury deadlock, "amounts to an acquittal on the merits and, as such, bars any retrial of the appropriateness of the death penalty."



*never* read either case that way. This Court's conception of an "acquittal" of death is the imposition of a life sentence after a trial-like proceeding tried to completion. *Schiro v. Farley*, 510 U.S. 222, 232 (1994); *Poland v. Arizona*, 476 U.S. 147, 152 (1986); *Smalis v. Pennsylvania*, 476 U.S. 140, 145 n.8 (1986); *Arizona v. Rumsey*, 467 U.S. 203, 211 (1984); *Bullington v. Missouri*, 451 U.S. 430, 445-46 (1981).

*Bullington* turned on the procedural requirements that made Missouri's capital sentencing proceeding trial-like, 451 U.S. at 433-35, and repeatedly stressed that the binary choice of sentences resulting from those proceedings – either life or death[12] – would determine whether the prosecution had proven its case for death, *id.* at 444-45. Moreover, the Court expressly included among its description of the "substantive standards" and "procedural protections" that qualified Missouri life sentences for double jeopardy protection that "[i]f the jury is unable to agree, the defendant receives the alternative sentence of life imprisonment." *Id.* at 435.

Thus, as described earlier, "the Double Jeopardy Clause applies to Missouri's *capital sentencing proceeding*" – not just to a unanimous jury verdict – and bars imposition of the death penalty on retrial whenever "an initial conviction, set aside on appeal, *has resulted in rejection of the death sentence*." *Rumsey*, 467 U.S. at 209. It similarly

[12] *Bullington*, 451 U.S. at 432 ("Missouri law provides two, and only two, possible sentences for a defendant convicted of capital murder: (a) death, or (b) life imprisonment without eligibility for probation or parole for 50 years."); *id.* at 440 ("Bullington's Missouri jury was given – and under the State's statutes could be given – only two choices, death or life imprisonment.").

applies to Arizona's capital sentencing proceeding, *id.* at 209-10; *Poland v. Arizona*, 476 U.S. 147, 154 n.4 (1986), and to Pennsylvania's.

Furthermore, the historic policies underlying the Double Jeopardy Clause make clear that the Fifth Amendment's double jeopardy protections attached when Petitioner's first penalty phase was tried to completion and produced a final judgment of life – whether or not that life verdict is denominated an "acquittal."

> The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. *This is central to the objective of the prohibition against successive trials.* The Clause does not allow "the State . . . to make repeated attempts to convict an individual for an alleged offense," since "[t]he constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green v. United States*, 355 U.S. 184, 187 (1957); see *Serfass v. United States*, 420 U.S. 377, 387-388 (1975); *United States v. Jorn*, 400 U.S. 470, 479 (1971).

*Burks v. United States*, 437 U.S. 1, 11 (1978) (footnote and parallel citations omitted); *United States v. DiFrancesco*, 449 U.S. 117, 136 (1980).

This Court has held that the values that underlie this central principle of double jeopardy jurisprudence "are equally applicable when a jury has rejected the State's claim that the defendant deserves to die." *Bullington*, 451 U.S. at 445.



> The "embarrassment, expense and ordeal" and the "anxiety and insecurity" faced by a defendant at the penalty phase of a Missouri capital murder trial surely are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial. The "unacceptably high risk that the [prosecution], with its superior resources, would wear down a defendant," id., at 130, 101 S.Ct., at 433, thereby leading to an erroneously imposed death sentence, would exist if the State were to have a further opportunity to convince a jury to impose the ultimate punishment.

*Bullington*, 451 U.S. at 445. All of these factors are presented whenever a State seeks a death-after-life sentence: the "embarrassment, expense and ordeal"; the "anxiety and insecurity"; the unacceptably high risk that the prosecution's superior resources will wear a defendant[13] down, are not affected by the formal mechanism by which the final judgment of life is entered. They are equally applicable when a judge has rejected the State's claim that the defendant deserves to die, *e.g.*, *Rumsey*, and when, as in this case, state law has rejected death by requiring the judge to direct a life verdict after the prosecution has failed to meet its burden of persuasion.

The prosecution is unquestionably entitled to "one fair opportunity" to obtain a capital conviction, *Bullington*, 451 U.S. at 442 (quoting *Burks*), but the Double Jeopardy Clause *limits* the prosecution to one fair opportunity. Where jeopardy of death has attached, a trial-like capital sentencing hearing has been tried to completion, and a final judgment of life has been entered, the defendant's

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[13] And particularly, as here, an indigent defendant.

jeopardy of death has terminated and, if he successfully appeals the underlying conviction, he may not be subjected to a second jeopardy of death.

This Court's November 1994 decision in *Schiro v. Farley*, 510 U.S. 222 (1994) eliminates any possible doubt as to the applicability of the Fifth Amendment's double jeopardy protections to Petitioner's second capital sentencing trial. Under double jeopardy, this Court wrote, "*the primary evil to be guarded against is successive prosecutions*: '[T]he prohibition against multiple trials is the controlling constitutional principle.'" *Id.* at 230 (quoting *United States v. DiFrancesco*, 449 U.S. 117, 132 (1980)). Thus, this Court explained in language that could not be much clearer, the "one fair opportunity" *Bullington* affords to prosecute a defendant "extends not only to prosecution at the guilt phase, but also to present evidence at an ensuing sentencing proceeding"; *Bullington* establishes a double jeopardy "prohibition *against a second capital sentencing proceeding*." *Id.* at 230. The Court unequivocally declared that a "capital sentencing proceeding '[is] itself a trial on the issue of punishment,'" and that "requiring a defendant to submit to a second, identical proceeding [would be] tantamount to permitting a second prosecution of an acquitted defendant." *Id.* at 232.

The Commonwealth of Pennsylvania was afforded a fair opportunity to present evidence against Petitioner in the capital sentencing proceedings in his first trial. The capital sentencing jury in that trial was not unanimously persuaded that he should be sentenced to death: on the contrary, three-quarters of the jurors believed that Petitioner should be sentenced to life imprisonment. Because the jury was unable to reach a unanimous sentencing verdict, the Pennsylvania capital sentencing statute



required the trial court to impose a life sentence as a matter of law. Pursuant to that law, the court directed a verdict of life imprisonment and entered a final sentence of life without possibility of parole. Petitioner's capital retrial after successfully challenging his unconstitutional conviction "was tantamount to permitting a second prosecution of an acquitted defendant," *Schiro*, 510 U.S. at 232, and was barred by double jeopardy.

The capital sentencing jury in Petitioner's first trial could not properly have returned – and the Commonwealth of Pennsylvania could not have imposed – a death verdict so long as the prosecution had failed to persuade any of the sentencing jurors (let alone nine of twelve) that death was the appropriate punishment.

> Since we necessarily afford absolute finality to a jury's verdict of acquittal – no matter how erroneous its decision – it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

*Bullington*, 451 U.S. at 442-43 (quoting *Burks*, 437 U.S. at 16); *Poland v. Arizona*, 476 U.S. at 153 n.2 (same).

David Sattazahn was sentenced to death after obtaining a life sentence when initially placed in jeopardy. Subjecting him to successive capital prosecutions, including twice facing the hazards of a capital sentencing hearing, violated double jeopardy. His death sentence must be vacated, and Pennsylvania forever barred from seeking death in his case.

## II. The Capital Retrial of David Sattazahn after His First Capital Sentencing Proceeding Resulted in the Imposition of a Life Sentence by Operation of 42 Pa. C.S. § 9711(c)(1)(v) Violated His Due Process Life and Liberty Interest in the Sentence Mandated by Pennsylvania's Death Penalty Statute.

When a state mandates certain capital sentencing procedures or establishes the right to particular appellate, post-conviction, or post-sentencing review in capital cases, it creates Fourteenth Amendment life and liberty interests in those procedures. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (due process interest in state created right to direct appeal); *see Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (liberty interest in state-created capital sentencing procedures); *Ford v. Wainwright*, 477 U.S. 399, 427-31 (1986) (O'Connor, J., concurring) (the "conclusion . . . is inescapable that Florida positive law has created a protected liberty interest in avoiding execution while incompetent"); *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288-89 (1998) (O'Connor, J, with Souter, Ginsburg & Breyer, JJ., concurring) (life interest in state-created right to capital clemency proceedings); *id.* at 291-92 (Stevens, J., concurring) (life interest in commutation procedures "abundantly clear"). Although the right to the particular procedure is established by state law, the violation of the life and liberty interest it creates is governed by *federal* constitutional law. *Hicks*, 447 U.S. at 346; *Ford*, 477 U.S. at 428-29; *see Evitts*, 469 U.S. at 393.

This Court's liberty interest jurisprudence has stressed several principles that compel its application to Pennsylvania's mandatory imposition of a life sentence resulting from a non-unanimous capital sentencing verdict. First, the



Court's cases "leave no doubt that where a statute indicates with 'language of an unmistakable mandatory character,' that state conduct injurious to an individual will not occur 'absent specified substantive predicates,' the statute creates an expectation protected by the Due Process Clause." *Ford v. Wainwright*, 477 U.S. at 428 (O'Connor, J., concurring) (citations omitted). Second, the Court has specifically determined that constitutional liberty interests are vested in a defendant when the State employs particular procedures "as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant.'" *Evitts*, 469 U.S. at 393. The process by which a defendant's sentence is imposed is an integral part of that system, even in non-capital cases. In capital cases, it *embodies* the system of finally adjudicating life or death. As a result, a defendant "has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the [sentencer] in the exercise of its statutory discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." *Hicks*, 447 U.S. at 346. Arbitrarily denying a defendant the "sentence to which he was entitled under state law, . . . is a denial of due process." *Id.*[14]

As described earlier, Pennsylvania's sentencing statute specifies two circumstances in which a death sentence may be imposed and mandates that "[t]he verdict must be a sentence of life imprisonment in all other cases."

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[14] While *Hicks* involved jury sentencing, it is beyond question that the substantiality and legitimacy of a defendant's expectation in the sentence "to which he [is] entitled under state law" remains the same whether he is sentenced by a jury or by the court.

42 PA. C.S. § 9711(c)(1)(iv). It further mandates that the court "shall sentence the defendant to life imprisonment" if it determines that the jury is unable to reach a unanimous verdict. 42 PA. C.S. § 9711(c)(1)(v).[15] The life sentence that results from these procedures is final and unappealable by either side.

Pennsylvania also requires both that the trial court instruct the jury as to the legal consequences of its failure to reach a verdict, 42 PA. C.S. § 9711(c)(1), and provide the capital sentencing jury a verdict slip that specifically explains that "the judge will sentence the defendant to life imprisonment," PA. R. CRIM. P. 358A (capitalization and emphasis omitted), if the jury cannot reach a unanimous verdict. As a result, sentencing juries know from the outset of deliberations that by disagreeing on the applicable sentence, the defendant will receive a life sentence. The jury in Petitioner's initial trial was provided and read this verdict slip, and knew that when it could not reach a unanimous verdict Petitioner would be sentenced to life.[16]

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[15] The Pennsylvania courts have recognized the mandatory character of the trial court's sentencing obligation. *Commonwealth v. Sattazahn*, 563 Pa. at 539, 763 A.2d at 362; J.A. at 92 (court "entered a mandatory life sentence" under subsection (c)(1)(v)); *Jones*, 546 Pa. at 199, 683 A.2d at 1199 ("subsection (c)(1)(v) . . . mandates that a court impose a life sentence where the jury is unable to reach a unanimous agreement"); *Martorano*, 535 Pa. at 194, 634 A.2d at 1070 (1993) (once judge finds that the jury is deadlocked, "[t]he statute directs him to enter a life sentence").

[16] This instruction creates a substantial and legitimate expectation *in the jury* as well as in the defendant that, in the event of a jury deadlock, the defendant will be sentenced to life. This removes the incentive for jurors who favor life to try to convince death-leaning jurors to reach a unanimous verdict because the jurors know the ultimate sentence will remain the same whether the verdict for life is 12-0 or, in

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There can be no debate as to whether the discharge of a non-unanimous capital sentencing jury under 42 PA. C.S. § 9711(c)(1)(v) actually produces a "sentence to which [a defendant is] entitled under state law." *Hicks*, 447 U.S. at 346. The procedures are statutorily delineated; their character is unmistakably mandatory. *Ford v. Wainwright*, 477 U.S. at 428 (O'Connor, J., concurring). They are an integral part of Pennsylvania's system for finally adjudicating whether a capital defendant will live or be sentenced to die. The Commonwealth cannot seek to empanel a new jury or to appeal the sentence. And the defendant, as verdict winner, has no basis or need to appeal. By establishing sentencing procedures that require the imposition of a life sentence whenever a capital sentencing jury does not unanimously agree to impose death, and requiring the judicial imposition of a life sentence when the jury cannot agree on a sentence, Pennsylvania created a substantial and legitimate expectation that a capital defendant who receives a judicially-imposed directed verdict for life resulting from a non-unanimous jury will not instead be subject to execution for his offense.

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this case, 9-3. Similarly, a death-leaning juror may hold out simply to make a point, even though he might ultimately have voted for life if he knew that deliberations would continue until the jury reached a unanimous decision.

Whereas both the defendant and the jury know that a deadlocked jury and a jury that is unanimous for life produce the same outcome, neither the defendant nor the jury has any notice that a non-unanimous verdict might possibly produce a "second-class" life verdict that could expose the defendant to a death sentence should he choose to appeal his conviction. In these circumstances, it is unfair to penalize the defendant – and a disservice is done to those jurors who would have pressed for unanimity – by *sub silentio* transforming the directed life verdict into a provisional life sentence.

That expectation is strengthened by two things Pennsylvania has not done, but which it would reasonably be expected to have done if it did not regard the directed life verdict as final. First, Pennsylvania makes no statutory distinction of any kind between the treatment of life sentences imposed by judicially directed verdicts and those imposed by unanimous juries, much less in the event the defendant successfully appeals his conviction. Second, Pennsylvania did not inform either the sentencing jury or Petitioner that a successful appeal could jeopardize a non-unanimous (but not a unanimous) life verdict and render Petitioner's life sentence a nullity. These omissions strengthen the already substantial and legitimate expectation that Pennsylvania would respect the life sentence that was mandated by its sentencing laws.

Pennsylvania was not constitutionally compelled to follow this approach.[17] Nonetheless, it chose to create this entitlement and did so in language of unmistakably mandatory character. Having done so, due process protects Petitioner from any arbitrary deprivation of the life sentence he received by operation of Pennsylvania law. *Hicks*, 447 U.S. at 346-47; *see also Ohio Adult Parole Authority v. Woodard*, 523 U.S. at 292-93 (Stevens, J., concurring) (same re: appellate and post-conviction remedies); *Ford*, 477 U.S. at 430-31 (O'Connor, J., concurring). Because Pennsylvania's statute, in the words of Justice Ginsburg, "does not provide for a second shot at death"

[17] Among numerous possible alternatives, the Commonwealth could have provided that a jury deadlock "would have resulted in impaneling a second jury," *United States v. Jones*, 2002 WL 464678 (5th Cir. March 27, 2002), or the empaneling of a three-judge panel to conduct a sentencing hearing and determine sentence, *e.g.*, NEV. REV. STAT. § 175.556 (West 2002).



following a deadlocked jury, *Jones v. United States*, 527 U.S. 373, 418 (1999) (Ginsburg, J., dissenting on other grounds), treating Petitioner as death-eligible and subjecting him to a second capital trial and a successive capital sentencing proceeding arbitrarily denies him this constitutionally protected right.

Perhaps if the life and liberty interests implicated in this case attached after conviction and sentencing, "the demands of due process [might be] reduced." *Woodard*, 523 U.S. 272, 288 (1998) (O'Connor, J., joined by Souter, Ginsburg & Breyer, JJ., concurring); *id.* at 290-94 (Stevens, J., concurring in part and dissenting in part).[18] But this is not such a case. Here, Pennsylvania had not "established its right to [capitally] punish"[19] David Sattazahn at the time his life and liberty interest attached in this case. Indeed, the outcome of David Sattazahn's first trial instead established that Pennsylvania was *disentitled* to capitally punish Petitioner, heightening rather than diminishing his expectation in a life sentence.

Moreover, David Sattazahn's *life* interest in full enforcement of the life sentence imposed at his first trial by operation of Pennsylvania law makes his due process interest even stronger than the liberty interests present in non-capital cases because the need for heightened reliability in capital sentencing adjudications requires more

[18] For example, *Ford v. Wainwright*, 477 U.S. 399 (1986) (liberty interest in not being executed while incompetent) and *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998) (life and liberty interest in executive clemency proceedings).

[19] *Woodard*, 523 U.S. at 288 (O'Connor, J., concurring) (quoting *Ford*, 447 U.S. at 429 (O'Connor, J., concurring in result)).

solicitous treatment by the Courts. As Justice Stevens has explained:

> The interest in life that is at stake in this case warrants even greater protection than the interests in liberty at stake in [non-capital] cases. For "death is a different kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different in both its severity and its finality .... From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 357-58, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977) (citations omitted) (plurality opinion).

*Woodard*, 523 U.S. at 293-94.

Once Pennsylvania created the mandatory entitlement to a life sentence, it was not at liberty to retroactively rescind the right by subsequently approving a second capital trial for a defendant whose right to a mandatory life sentence had already vested. Subjecting Petitioner to a capital resentencing hearing and the resulting death sentence, when the Commonwealth had no basis or ability to challenge the life sentence he received in his original trial and when neither the sentencing statute nor the trial court gave Petitioner notice that a successful appeal of his conviction could have any possible implications



for that life sentence,[20] constituted an arbitrary denial of Petitioner's life and liberty interest in that life sentence. This Court should reverse Petitioner's death sentence, and enforce his life and liberty interest in the directed life verdict that was mandated by Pennsylvania's capital sentencing statute.

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[20] The record is devoid of any evidence that anyone at any time prior to overturning his conviction ever alerted Petitioner to the possibility that a successful appeal could place his life in jeopardy.

## CONCLUSION

For all the foregoing reasons, this Court should reverse David Sattazahn's death-after-life sentence as having been imposed in violation of the Double Jeopardy Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. This Court should grant Petitioner relief and remand this case to the Supreme Court of Pennsylvania with directions to impose a sentence of life imprisonment.

Respectfully submitted,

ROBERT BRETT DUNHAM
*Counsel of Record*
ANNE L. SAUNDERS
DEFENDER ASSOCIATION
OF PHILADELPHIA
Federal Court Division
Suite 545 West, The Curtis Center
Independence Square West
Philadelphia, PA 19106
(215) 928-0520

JOHN T. ADAMS, ESQUIRE
LINTON, DISTASIO, ADAMS
& PALANGE, P.C.
1720 Mineral Springs Road
P.O. Box 461
Reading, PA 19603-0461
(610) 374-7320

*Counsel for Petitioner, David Allen Sattazahn*

Dated: June 3, 2002